Statement of Ruth E. Friedman

Thank you for this opportunity to address the Subcommittee on H.R. 3035. I have spent the better part of the last seventeen years representing prisoners in state and federal post-conviction proceedings. My practice has consisted primarily of capital cases in the Deep South, most notably Alabama, where lawyers both willing and able to take on such cases are in short supply. I have also worked in an advisory capacity for the Office of Defender Services of the Administrative Office of the United States Courts, assisting in efforts to improve the quality of habeas resources in a number of southern states. I have counseled, consulted with, or trained lawyers handling habeas corpus cases in every death penalty jurisdiction in the country.

Over these last two decades, I have seen the availability of the "Great Writ" to address real constitutional error shrink considerably. If a lawyer neglects to raise an issue properly in state court, it will be procedurally defaulted, and thus forever barred from federal review. If the Supreme Court decides that a practice violates the Constitution, but does so after my client has completed his state appeal, federal habeas relief as to that claim will be permanently unavailable to him. Prisoners are now executed without any habeas review if their attorneys miss the statute of limitations filing deadline by a single day. These changes, both statutory and judge-made, have seriously restricted the ability of habeas petitioners even to get inside the federal courthouse door.

But no change that either Congress or the courts have made in the history of the writ comes close to what H.R. 3035 – the "Streamlined Procedures Act" – is contemplating. This bill represents an unprecedented assault on the role of the federal courts in vindicating our constitutional rights. Unlike any prior reform or revision, this legislation would strip the federal judiciary of jurisdiction to consider claims of serious constitutional error arising from state court convictions. In so doing, it would dismantle years of Supreme Court jurisprudence and, in ways I will describe in more detail below, wreak havoc on the administration of criminal justice. And H.R. 3035 would deal this crippling blow to habeas corpus without any evidence of a need for such extreme measures.

I believe that this proposed bill, which would in some respects effectively repeal the writ of habeas corpus, is based on several flawed assumptions. One of these is that habeas is a remedy that is now widely available and easily subject to abuse. I would thus like to take a brief look at the history of the writ and the current state of habeas jurisprudence before turning to the effects of this radical bill's provisions.

A brief history of habeas corpus

Petitioning for a writ of habeas corpus is one of the most ancient and fundamental rights guaranteed by our Constitution. It has been a steadfast presence in the law both in England from the seventeenth and eighteenth centuries and in this country from its very beginnings. The habeas writ provides a vehicle for the vindication of core rights and liberties. For any constitutional right -- the right to free speech, for example, or to assemble, to a fair trial and due process, to freedom from unjust or cruel punishment -- would be worthless without a procedural mechanism through which to vindicate it. In the words of Justice Oliver Wendell Holmes, "Habeas corpus cuts through all forms and goest to the very tissue of the structure. It comes in from the outside, not insubordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell."[1]

Thus, for centuries, the writ of habeas corpus provided a federal forum in which citizens could challenge their imprisonment if serious mistakes were alleged. Through their habeas jurisdiction, the federal courts have had the opportunity to step in and remedy egregious trespasses of key fundamental rights.[2]

Up through the 1970's, the implementation of the habeas remedy generally focused on whether federal constitutional error had deprived the petitioner of a fair trial or reliable verdict. Federal courts were free to conduct evidentiary hearings where they believed a more complete factual record would enhance the quality of their rulings;[3] they could hear claims not previously presented to the state courts unless the prisoner had deliberately withheld them;[4] they were charged with determining, *de novo*, whether the facts proved a violation of the Constitution;[5] and they could entertain more than one petition from the same prisoner so long that the petitioner's conduct did not "abuse" the writ.[6]

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1 *Frank v. Magnum*, 237 U.S. 309, 346-47 (1915) (Holmes, J., dissenting).

2 *See e.g., Moore v. Dempsey*, 261 U.S. 86 (1923) (due process violation where trial dominated by mob and state corrective process inadequate); *Rogers v. Richmond*, 365 U.S. 534, 540 (1961) (coerced confessions "offend an underlying principle in the enforcement of our criminal law" and violate due process).

3 *Townsend v. Sain*, 372 U.S. 293 (1963).

4 *Fay v. Noia*, 372 U.S. 391 (1963).

5 *Miller v. Fenton*, 474 U.S. 104 (1985).

6 *Sanders v. United States*, 373 U.S. 1 (1963).

But, beginning with its opinion in *Stone v. Powell*[7] in 1976, and accelerating in the mid-1980's, our Supreme Court began to reshape the habeas landscape. The Court issued a series of opinions overhauling its writ jurisprudence and significantly tightening access to habeas review. This jurisprudential reform was intended to advance the principle of federalism and the goal of finality. Its effect was to significantly restrict habeas relief for state prisoners.

Stone v. Powell held that Fourth Amendment claims -- allegations that a person was illegally arrested or a car improperly searched -- were not cognizable in federal habeas corpus proceedings if there had been a full and fair opportunity to litigate the claim in state court. The Court concluded that a state-court conviction founded on evidence derived from an unconstitutional search would nonetheless be upheld if the state court process was sufficient. Thus began a doctrinal shift from an inquiry into the substantive merits of a legal issue to a review of the procedure that produced the result.

Next, in a series of cases beginning with *Wainwright v. Sykes*,[8] the Court abandoned the rule that a prisoner had to have deliberately bypassed the state process before a claim could be found procedurally barred. Instead, it ruled that any claim not raised in state proceedings could not be heard in federal habeas unless the petitioner could show "cause" for his failure to comply -- usually that his trial counsel's performance was so inadequate as to constitute a violation of the Sixth Amendment right to counsel, or that state officials interfered with the timely assertion of the claim – plus actual "prejudice" – i.e., that the error substantially affected his verdict. Many prisoners, including those on death row, have permanently lost federal review of potentially meritorious constitutional claims due to state-imposed procedural bars.

In another bow to finality, the Court made changes to the "exhaustion" requirement, whereby petitioners must first "exhaust" their state remedies before seeking federal relief. It promulgated a firm rule that petitions that contained both exhausted and unexhausted claims must be dismissed.[9] In practice, this meant that a federal court could not address a meritorious constitutional claim if the habeas petition contained an unrelated, unexhausted claim. While this rule arguably strengthened the core reason for the exhaustion doctrine, it also significantly increased the burden on petitioners as well as the procedural complexity of the federal habeas proceeding.

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7 428 U.S. 465 (1976)

8 433 U.S. 72 (1977); *see also Murray v. Carrier*, 477 U.S. 478 (1986) and *Smith v. Murray*, 477 U.S. 527 (1986)

9 *Rose v. Lundy*, 455 U.S. 309 (1982)

Also in the 1980's, the Court significantly altered the rules governing which decisions would be available to habeas petitioners when challenging their convictions and sentences in habeas. In *Teague v. Lane,*[10] the Court reversed the approach that most of its decisions would be fully applicable in habeas, holding instead that nearly all favorable rulings announced after a petitioner's conviction becomes final cannot benefit him in habeas proceedings. (Rulings *contrary* to the petitioner's interest *are* applied retroactively.) A federal court must therefore make a retroactivity assessment before even addressing the merits of a habeas claim and summarily deny any claim that seeks a "new rule" of law or is based on a "new rule" promulgated since that case was on direct review. The effect of *Teague* has been a significant restriction on the ability of petitioners to obtain habeas relief and a further move away from the merits of a constitutional claim of error toward a complex procedural inquiry.

In the early 1990's, the Court turned to restricting the availability of evidentiary hearings in federal habeas proceedings. While previous law allowed and often required a federal hearing under a variety of circumstances,[11] the Court now announced that if the prisoner had had a full and fair opportunity to develop the facts in state court, no hearing could be held in federal court unless the inmate could show "cause" and "prejudice" for the failure.[12] Such a restriction was particularly harsh when applied against indigent petitioners who had no lawyer or plainly deficient legal assistance in state court

In addition, the Court decided that the traditional "harmless error" rule **B** that once constitutional error is shown, the state has the burden to establish, beyond a reasonable doubt, it was not harmful[13] **B** would no longer apply in habeas proceedings. The Court held that habeas relief could be granted only if the constitutional violation could be shown to have *substantially* influenced the jury verdict.[14]

The Supreme Court also significantly restricted second or successor habeas petitions in the 1990's, abandoning the approach that permitted the filing of such

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10 *Teague v. Lane*, 489 U.S. 202 (1989)

11 *Townsend v. Sain*, 372 U.S. 293 (1963).

12 *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992)

13 *Chapman v. California*, 386 U.S. 18 (1967).

14 *Brecht v. Abrahamson*, 307 U. S. 619 (1993).

applications. The Court allowed second petitions, regardless of the merits of the new or repeated claim, to be reviewed only in extremely limited circumstances.[15]

Collectively, the Supreme Court's efforts to reform habeas corpus law from the late 1970's to the mid-1990's transformed the Great Writ. Essentially, prisoners now had one shot at federal review. They had to avoid state-court default and present fully exhausted petitions. They faced substantial but not insurmountable burdens to secure merits review of claims or evidence not properly presented to the state courts. Relief was available only if the error played a significant role in the judgment and was not based upon a "new rule" of constitutional interpretation. Before this reform, "the focus of the federal courts was on the familiar and often easy task of determining the merits of constitutional claims."[16] Subsequently, relief became much more difficult to obtain and, in addition, both the federal courts and the litigants had to wade "through a morass of new, complicated, and ever-changing procedural rules."[17]

Thus, when Congress passed the 1996 Anti-terrorism and Effective Death Penalty Act ("AEDPA") in the wake of the Oklahoma City bombing, the Great Writ -- "the most celebrated writ in the English law"[18] -- had already been significantly diminished in scope and effect.

The profound changes brought by the AEDPA further reduced the opportunities for prisoners to petition the federal judiciary for freedom from unjust confinement. For the first time in the history of the writ, the AEDPA erected a one-year statute of limitation for all habeas applications.[19] No Congress had previously imposed any such limitation.[20] For capital cases, the AEDPA contained a separate chapter **B** commonly known as the "opt-in" provision **B** that promulgated a six month statute of limitations and complete federal review within designated time periods for qualifying states. In order to qualify, states had to

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15 *McCleskey v. Zant*, 499 U.S. 467 (1991); *Sawyer v. Whitley*, 505 U.S. 333 (1992).

16 Friedman, Barry, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 Calif. L. Rev. 485, 541 (1995).

17 *Id.*

18 3 W. Blackstone, Commentaries, 129.

19 28 U.S.C. § 2244(d)(1).

20 Previously, petitioners had been subject to a flexible and equitable doctrine disfavoring delay under Rule 9 of the Rules Governing Section 2254 Cases.

implement an independent, meaningful system for appointing and funding qualified counsel during the state post-conviction process. Despite the incentive, few states have elected to enhance their post-conviction review process sufficiently to "opt-in." [21]

The general one-year statute of limitation has certainly succeeded in inducing petitioners to expeditiously file their petitions. It has also meant that numerous prisoners, by failing to comply with this provision, have been barred from federal review of the lawfulness of their incarceration. Further, courts have found cause to toll the limitations period only upon a showing of extremely extenuating circumstances. Thus, death row inmates have been executed under the AEDPA without any federal review of the constitutionality of their convictions or sentences because their lawyers missed the filing deadline.[22]

In addition to accelerating habeas filings, the AEDPA implemented a review process requiring significant deference to state court findings of fact and conclusions of law. With regard to facts, it abandoned an earlier statutory requirement that the state court fact finding process be adequate, and declared that *any* state fact finding be presumed correct unless it is shown to be erroneous by clear and convincing evidence.[23] The statute now also prohibits a federal evidentiary hearing in any case unless the petitioner can show he was prevented from developing the facts in state court, or that, despite diligent effort, the facts were not available, and, by clear and convincing evidence, he is innocent.[24] These

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21 Many never attempted, and some made a half-hearted attempt with inadequate systems that were then never reformed. *See, e.g., Leavitt v. Arave*, 927 F. Supp. 394 (D. Idaho 1996)(Idaho); *Williams v. Cain*, 942 F. Supp. 1088 (W.D. La. 1996) (Louisiana); *Sexton v. French*, 163 F.3d 874, 876, n. 1 (4th Cir. 1998) (North Carolina). One state, Arizona, has met the standards but did not receive expedited review in the case under review because the petitioner himself had not received the benefits of the enhanced counsel system. *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2001). In the next case in which it has implemented its own procedures, Arizona will get the benefit of the opt-in system.

22 *See, e.g., Ex Parte Rojas*, 2003 WL 1825617 (Tex. Crim. App.)(federal habeas petition time-barred where lawyer serving third probated suspension for failure to competently represent clients did not take any action to preserve petitioner's federal habeas review and failed to notify petitioner state court denied relief); *Lookingbill v. Cockrell*, 293 F.3d 256 (5th Cir. 2002); *Kreutzer v. Bowersox*, 231 F.3d 460 (8th Cir. 2000); *Cantzu-Tzin v. Johnson*, 162 F.3d 295 (5th Cir. 1998).

23 28 U.S.C. § 2244(e)(1).

24 28 U.S.C. § 2244(e)(2).

provisions sharply constrain the federal habeas courts, and allow factual development only in narrow circumstances.

With regard to state court legal determinations, the AEDPA amendments took the extraordinary step of removing the traditional power of the federal court to review a legal determination *de novo*. They imposed the rule that no legal determination can be disturbed unless it is contrary to a directly controlling Supreme Court decision, or amounts to an unreasonable application of such authority.[25] This constituted a landmark shift in habeas jurisprudence. Supreme Court construction of this provision has made clear that state court legal determinations cannot be disturbed even when they are clearly wrong: They may be disturbed only when they are *unreasonably* wrong.[26]

Thus, the AEDPA amendments enacted sweeping changes to habeas, each of which was designed to further protect state finality interests and speed up the review process. Taken with the Supreme Court's earlier comprehensive pruning of habeas, the Writ that exists today is a vastly scaled back remedy. It reaches only a subset of the cases where egregious harmful constitutional error deprived the petitioner of a minimally fair trial.

The "Streamlined Procedures Act"

Yet this is the habeas writ that the "Streamlined Procedures Act" seeks to roll back: One that is already highly deferential to state interests and unforgiving of prisoner mistakes. The fundamental changes the Subcommittee considers today would deprive the federal courts of any real ability to address constitutional error. In section after section, this legislation would promote the withholding of evidence by state actors; eviscerate federal review of death sentences; and minimize incentives for states to improve their counsel systems. It would also undoubtedly result in the prolonged incarceration and execution of the innocent.

Nearly every provision in H.R. 3035 is troubling. Some will at a minimum spawn years of the kind of interpretive confusion only now being settled a decade after the AEDPA's enactment. Others appear to be based on faulty assumptions unsupported by data, and still others are likely to have effects surely unintended by the bill's drafters. As the problems are too many and too varied to all be addressed in this setting, I would like to focus here on some of the most glaring pitfalls in the bill's major provisions.

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25 28 U.S.C. § 2254(d).

26 *Williams v. Taylor*, 529 U.S. 420 (2000).

Exhaustion of State Remedies (Section 2)

As I noted earlier, state prisoners are required to exhaust state court avenues for litigating their federal claims before petitioning the federal courts for a writ of habeas corpus. This allows state courts the first opportunity to correct their own errors and is a sensible administrative rule that guarantees federal adjudication at the proper *time*. Because the new statute of limitations was to some extent in conflict with *Rose v. Lundy*'s rule of exhaustion, the Supreme Court just last term decided a case that reconciled these two timing rules. It held in *Rhines v. Weber* that a federal petition can be stayed while a petitioner returns to state court, but only if there is "good cause" for the failure to exhaust, the claim is "potentially meritorious," there is no indication that the petitioner intentionally engaged in dilatory tactics, and the court places a reasonable time limit on the petitioner's return for federal adjudication.[27]

Section 2 of H.R. 3035 would scrap both *Rose v. Lundy* and *Rhines v. Weber*. It would require dismissal of any unexhausted claim "*with prejudice*," that is, without the possibility of federal court review at a later time. A failure to exhaust would no longer be excused even if no state remedy was even available for the inmate.[28] Thus, if the state court simply refused to act on a claim,[29] there would be nothing the petitioner could do about it. If a state remedy did appear to be available, the petitioner could still not return to state court to present the issue even if there was "good cause" for failing to exhaust a "potentially meritorious" claim.

One problem in Section 2 that is seen throughout this bill is that it would punish petitioners for circumstances beyond their control. Reasons for the failure to exhaust include the prosecution's concealment of evidence during state proceedings;[30] trial or appellate counsel's constitutionally defective

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27 *See Rhines v. Weber*, 125 S. Ct. 1528, 1533-35 (2005).

28 Under current law, a failure to exhaust may be excused if there are no "remedies available in the courts of the State," there is "an absence of available State court corrective process," or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1).

29 *E.g.*, *Turner v. Bagley*, 401 F.3d 718 (6th Cir. 2005) (excusing failure to exhaust where state court failed to adjudicate petitioner's appeal for eight years); *Story v. Kindt*, 26 F.3d 402 (3d Cir. 1994) (excusing failure to exhaust where state courts delayed review of post-conviction petition for nine years).

30 *E.g.*, *Banks v. Dretke*, 540 U. S. 668 (2004).

representation;[31] or the state court's arbitrary refusal to consider the claim or admit the evidence.[32] Most prisoners have no lawyer at all in state post-conviction; some have been given incompetent or even impaired counsel. If H.R. 3035 had been the law, for example, Ledell Lee, an Arkansas death row inmate, would not have had his case sent back to state court for proper proceedings even though his post-conviction lawyer was drunk during his hearing.[33]

Section 2 would thus advance principles of neither comity nor fairness. It proceeds from the erroneous premise that prisoners *want* to delay federal adjudication of their claims. Ninety-nine percent of state prisoners are serving prison sentences they hope to cut short by winning federal habeas corpus relief. For the 1% under sentence of death, *Rhines* has already addressed concerns about unwarranted delay.

Amendments (Section 3)

Any legitimate problems meant to be served by Section 3 also have been resolved by recent Supreme Court action. Under current law, a federal habeas petitioner must generally request and receive permission to amend his petition after the state has answered. Under the Court's decision last term in *Mayle v. Felix*, an amendment to a petition submitted after the statute of limitations has run does not "relate back" to the date the original petition was filed under Fed. R. Civ. P. 15(c)(2) unless the petition and the amendment "are tied to a common core of operative facts."[34] *Felix* obviates any possible concern about petitioners extending the one-year limitations period by amending their petitions.

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31 *E.g.*, *Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001).

32 *E.g.*, *Soffar v. Dretke*, 368 F.3d 441, 478-79 (5th Cir. 2004).

33 *Lee v. Norris*, 354 F.3d 846 (8th Cir. 2004) (post-conviction lawyer was "impaired to the point of unavailability").

34 *Mayle v. Felix*, 125 S. Ct. 2562, 2574 (2005).

Yet Section 3 would permit a petitioner to amend his petition only once and not after the earlier of the state's filing of an answer or the running of the one-year limitations period. Thus, it would eliminate the relation-back doctrine even when the amendment *is* closely tied to the original claims. This is unnecessary, since the state is on notice of and is not prejudiced by amendments tied to the same core of operative facts already before it. This provision once again encourages the withholding of evidence: If a prisoner learned during federal proceedings that the state had violated *Brady v. Maryland*, for example, by concealing critical information, he could not seek redress.

Procedural Default (Section 4)

The provision on procedural bars is among the most problematic in the bill. Section 4 would nullify decades-old doctrines of comity and federalism designed to respect state court procedural rules while maintaining the federal courts' constitutional duty to remedy unlawful incarcerations and sentences. Current law strives to preserve that balance: It precludes federal habeas review of the merits of a claim if the petitioner failed to comply with a state procedural rule that is "independent and adequate" to bar all federal review. A state rule is considered adequate and independent if the petitioner actually violated a state rule that was

independent of federal law and that was "clear," "firmly established," and "regularly followed" at the time the alleged procedural default occurred.

That rule may appear to some too obvious to quarrel with. Yet prisoners have seen their claims defeated by states that imposed a rule *after* it was allegedly violated;[35] or insisted on a default even though the prisoner had complied with all that was demanded of him;[36] or rewarded the prosecutor for successfully hiding the evidence until it was too late for the inmate to press the claim.[37] Nevertheless, proposed Section 4, in new § 2254(h)(1), would strip the federal courts of jurisdiction to consider any federal constitutional claims that were "found by the State court to be procedurally barred." Thus, state courts would be free to "find" transgression of rules that did not exist at the time, could not have been complied with, or served no conceivable state interest.[38] The federal courts would be required to simply take the state court's word that the claim was procedurally barred.

Section 4 has other deeply troubling aspects. The provision would strip the federal courts of jurisdiction over any allegation of ineffective assistance of counsel related to the procedural bar. Thus, if a court-appointed attorney were sleeping during the trial and failed to object to blatantly unconstitutional conduct, his client would nonetheless be deprived of a federal forum in which to establish such injustice. While current law requires a state to make plain whether it is invoking a default, H.R. 3035 would place the burden of disentangling ambiguous rulings on the federal court. In some instances, even where the state court ruled fully and clearly on the merits of a petitioner's federal constitutional claim, the habeas court would be deprived of jurisdiction to assess even the unreasonableness of that decision.

It is far from clear what the purpose of this amendment might be. As noted earlier, it is already very difficult for a petitioner to prevail if a state court has imposed a procedural bar. One likely effect of Section 4, however, would be to encourage the withholding of the evidence needed to assert the claim in state court; another would be for state actors, who in many jurisdictions write the findings of fact and law for post-conviction judges, to create new defaults for the

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35 *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991).

36 *Lee v. Kemna*, 534 U.S. 362 (2002).

37 *Banks v. Dretke*, 540 U.S. 668 (2004).

38 *Lee v. Kemna*, 534 U.S. 362 (2002).

unwary or even unrepresented inmate. Section 4 would serve little purpose other than to insulate such misconduct.

Tolling (Section 5)

H.R. 3035's tolling section is one example of a provision that could not have been intended to act as drafted. It would clearly create chaos in the courts. For one, Section 5 would allow tolling of the AEDPA's one-year statute of limitations only when an application for review of a "claim" was pending, as opposed to an application for review of the "judgment or claim" as the law stands now. Many states do not allow a claim asserted on direct appeal to be raised again in state post-conviction, and in any state, claims that require investigation of facts outside the trial record (such as prosecutorial withholding of exculpatory evidence, jury misconduct, or ineffective assistance of counsel) can be raised only in post-conviction. Under Section 5, a petitioner would have statutes of limitations running at different times on different claims, and would theoretically have to file one habeas petition for his direct appeal issues and another for his post-conviction claims. But as the law already prohibits the filing of more than one habeas application, this would not be possible, and he would be forced to lose one set of claims or the other.

Section 5 would also preclude the tolling of any time between courts during the post-conviction process. Thus a prisoner whose federal clock was running would be encouraged not to use the time the state gave him to properly prepare his brief on appeal lest he use up the time he needed to get into federal court. The state could effectively thwart the right to habeas by holding up the compiling of the record for appeal, for example, until the federal clock had run out. A capital petitioner whose lawyer dropped the case after the trial level in post-conviction could see his federal statute of limitations expire while he sought new counsel. This provision promotes neither fairness to the petitioner nor respect for state court process.

Section 5 would also prohibit equitable tolling, an infrequently used but important failsafe generally available where statutes of limitations are imposed. It has been invoked to date in the habeas context in rare instances to correct injustice when a prisoner who has been pursuing his rights diligently was unable to comply with the statute of limitations because an extraordinary circumstance stood in his way. For example, if not for equitable tolling, Curtis Brinson of Pennsylvania would have been shut out of federal review. Mr. Brinson learned in federal court of evidence supporting his claim of intentional racial discrimination in the selection of his jury. Over his objections, the state convinced the district court judge to require him to return to state court to exhaust this new evidence. The state then urged the state court to rule that the state petition was untimely because

the 60-day period for raising a claim based on newly discovered evidence had passed, even though it had in fact passed before the state moved to send the case back for exhaustion. Thus, when Mr. Brinson returned to federal court, he could not get statutory tolling as the district court had assumed he would. The district court found that this was fundamentally unfair and ordered equitable tolling of the otherwise time-barred claims. The Court of Appeals for the Third Circuit affirmed the tolling decision and granted habeas relief in an opinion authored by Judge Alito.[39] None of this would have been possible had H.R. 3035 been law.

Finally, Section 5, like nearly every other provision in this bill, would be fully *retroactive* to cases already in the pipeline. It would thus retroactively strip petitioners now properly attempting to exhaust their claims in the state forum of any chance at habeas review by "untolling" the statute of limitations. Section 5 would be especially harsh for the overwhelming majority of habeas petitioners who are not represented by counsel and must navigate this maze alone.

Harmless Error in Sentencing (Section 6)

Section 6 is a virtual repeal of habeas corpus for sentencing claims. This provision would strip the federal courts of jurisdiction to remedy unconstitutional sentences of death if the state court found the constitutional violation to be "harmless" or "not prejudicial," no matter how unreasonable or unlawful that determination. Section 6 would have the odd effect of withdrawing habeas jurisdiction where an error was deemed harmless, but sustaining jurisdiction where the state court found no error at all. Because in many jurisdictions, the prosecution writes the findings of fact for the state post-conviction judge, this provision would serve to encourage "harmlessness" determinations in the state courts.

It is not at all clear what purpose this section could sensibly serve. Many accused of capital crimes are still defended by lawyers who do not investigate their cases and present no evidence to save their lives. In many jurisdictions, the trial court judge is asked to rule on the validity of the sentence she herself imposed, and must face the political reality of defending any grant of relief when running for reelection. Section 6 would most likely lead to the execution of individuals with serious constitutional error that the state court deemed non-prejudicial. In the *Banks* case, for example, the state withheld key evidence about the witness whose testimony provided the only basis for the finding that Mr. Banks could be a future danger. Findings of harmlessness could shield such

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[39] *See Brinson v. Vaughn*, 398 F.3d 225 (3d Cir. 2005), *cert. denied, DiGuglielmo v. Brinson*, __ S. Ct. __, 2005 WL 2494217 (Oct. 11, 2005).

misconduct from review. Similarly, under Section 6, Texan Ernest Willis would have been executed, although his prosecutors withheld their expert's report stating that he did not pose a future danger, without which he would have been ineligible for the death penalty under Texas law40. Mr. Willis was subsequently determined to be innocent of any crime. Pennsylvanian Fred Jermyn would have been executed, although his lawyer did no investigation for the penalty phase and thus did not present the overwhelming mitigating evidence the State now agrees warrants a sentence of life.41

"Opt-In" Procedures (Section 9)

Section 9 of this bill would indeed amount to a repeal of the Great Writ in any state that satisfied its requirements for capital cases. If a state provided competent, independent and fairly compensated post-conviction counsel – something we would hope all states would do where human life is at stake, although resources and political capital are often lacking – then there would be *no* jurisdiction over any aspect of the case in federal court. This is a simply stunning proposal.

The problems with this provision are numerous. First, it would strip the federal courts of jurisdiction to review *any* claim arising in an opt-in state, whether it was properly raised in state court or not raised in state court through no fault of the prisoner. This is habeas repeal, pure and simple. Second, it would take the decision as to whether and when a state was qualified from a neutral Article III court and place it in the hands of the Attorney General, an Executive Branch official who routinely files *amicus* briefs supporting states and opposing petitioners in habeas cases, with virtually unreviewable discretion. This would create at least the appearance of biased decision-making, and runs the risk of violating separation of powers doctrine. Third, Section 9 would permit retroactive certification. It would allow states to appoint counsel past the deadline under 28 U.S.C. § 2263, obtain certification with an "effective date" on or before the date counsel was appointed, and then obtain a ruling that the petition is time-barred

The driving force behind section 9 may have been a misconception that the states have tried in good faith to opt in under the special provisions for capital cases currently in place, but that the federal courts have unfairly prevented them from doing so. There is no evidence that this is in fact the case. The more likely explanation is that states have chosen not to opt in because they receive substantial benefits under the normal provisions of the AEDPA without having to provide

40 *Willis v. Cockrell*, 2004 WL 1812698 (W.D. Tex. Aug. 9, 2004)

41 *Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001).

competent post-conviction counsel. Pennsylvania is one example. Soon after the AEDPA's enactment, Pennsylvania death row inmates, not having been able to discover what set of deadlines they needed to comply with, filed a class action lawsuit asking the federal court to order the State to declare whether or not it was an opt-in jurisdiction. The State declared that it did not meet the statutory requirements, and the Third Circuit agreed.[42] Pennsylvania has never claimed since then that it has met the opt-in requirements.

More disturbing, a few states have sought to take advantage of the short deadlines and special deference reserved for opt-in states without having complied with their obligations under the statute. In *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2001), the Ninth Circuit found that Arizona had a facially qualifying mechanism. A necessary basis for that conclusion was that Arizona had a rule requiring appointment of counsel within 15 days of the Arizona Supreme Court's issuance of notice of the mandate after denial of certiorari by the United States Supreme Court. Arizona did not follow its 15-day rule in *Spears*, instead appointing counsel *twenty months* after the Supreme Court denied certiorari. Although Mr. Spears's lawyer was not even appointed until well past the opt-in filing deadline, Arizona sought to have the habeas petition that the lawyer filed, after he was appointed, time barred under that deadline. The Ninth Circuit appropriately found that Arizona had utterly failed to appoint counsel in a timely manner. In any case in which counsel is timely appointed, however, Arizona will get the benefit of the opt-in provision.

The effects of proposed section 9 would be unprecedented in habeas jurisprudence. Rather than recognizing that the states have failed to provide a system for and actual appointment of competent counsel and attempting to stimulate improvement, this provision would reward them – mightily -- for not having done so.

Other Concerns and Misconceptions

There are many other serious flaws in this bill. For example, it would needlessly strip the federal courts of jurisdiction over clemency determinations, including claims of racial bias or witness intimidation, although such challenges are already exceedingly rare. It would change the way requests for funding are handled in a manner that will immediately implicate due process and equal protection guarantees. In an effort to be more mindful of the concerns of victims, it incorporates wholesale a recently-enacted victims' rights statute designed for trial proceedings into a process guided primarily by questions of law. That the

42 *Death Row Prisoners of Pennsylvania*, 106 F.3d 35 (3d Cir. 1997).

provisions of H.R. 3035 are meant to be applied retroactively to cases already pending is alone a recipe for chaos in the administration of habeas review.

Time does not permit me to address all of the problematic aspects of this bill. There are two points though that I would like to mention before I close. The first is the misconception some may harbor about the continuing need for federal habeas corpus review. It would be a mistake to believe that we no longer need careful oversight of state deprivations of life or liberty, that government need no longer "be accountable."[43] We continue to hear regularly of prisoners released after decades of unjust incarceration or exonerated on the eve of execution.[44] Where I practice, people are still imprisoned or sent to their deaths without ever having received proper representation or the tools with which to mount a defense. Over 70% of Alabama's death row prisoners were represented by lawyers whose combined investigative, research and preparation efforts were capped at a payment of $1000. Unfortunately, Alabama makes no provision whatsoever to give condemned inmates any sort of legal assistance in preparing and presenting post-appeal petitions.[45] Moreover, death-row prisoners in Alabama who can get a petition timely filed within the statute of limitations cannot typically obtain independent judicial fact finding or decision making without the assiduous efforts of competent and dedicated counsel, all of whom must work essentially for free.[46]

For many death-row prisoners across the country, federal habeas corpus review under current AEDPA standards represents the first opportunity to obtain independent judicial reviews of the adequacy and constitutionality of the state process. Texas inmate Joe Lee Guy, for example, was represented at trial and appeal by a lawyer who had been disciplined repeatedly by the State Bar for neglecting his (non-capital) clients. He also suffered from drug and alcohol addiction. His defense was mounted by an investigator who developed a relationship with the surviving victim in the case, a woman who ultimately left

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43 *Fay v. Noia*, 372 U.S. 391, 401-402 (1963).

44 One particularly chilling example is that of Anthony Porter of Illinois. He received a last-minute stay of execution to pursue a claim of mental retardation. While that stay was in effect, a journalism class reinvestigated his case and established his innocence of the crime.

45 ALA. CODE ' 15-12-23 (1975) (as amended by Act 99-427 (1999)).

46 Counsel need only be appointed in post-conviction cases in Alabama *after* a petition is filed. Some would-be petitioners have located counsel only after their statutes of limitations have expired. When counsel is appointed, her total compensation for all time spent on the case, in and out of court, is limited to $1000. It *costs* lawyers money to represent capital petitioners in post-conviction in Alabama.

him her estate in her will. Mr. Guy's post-conviction lawyer filed a 9-page petition that raised none of this, nor challenged the fact that Mr. Guy, the outside "lookout" in a robbery, was on death row while the men who killed the victim had their lives spared. Although the Texas Court of Criminal Appeals had evidence in its own file that cast serious doubt on the fairness and reliability of the trial results, the Texas appellate court did not question the competence of state habeas counsel or call for further inquiry, instead denying relief and leaving Mr. Guy to bear the grave consequences of his lawyer's incompetence. It was only in federal court that he was able to gain appropriate review and relief.47

For others, the very absence of qualified counsel in state post-conviction closes the door forever to habeas review. Another Texas inmate, Leonard Rojas, was given a state habeas lawyer who had been disciplined twice and received two 48-month probated suspensions from the practice of law by the State Bar before the Texas Court of Criminal Appeals assigned him to this case. The lawyer was still on probation at the time of his appointment and was so continuously throughout his representation of Mr. Rojas. Fourteen days after the Texas court appointed him to the Rojas case, the State Bar disciplined him a *third time*. Despite these violations, counsel was deemed "qualified" for this capital case. He filed a thirteen-page petition raising thirteen claims for relief, twelve of which were not cognizable in state habeas. When the post-conviction appeal was denied, he failed to file the motion required under state law for appointment of federal habeas counsel or to inform his client that the appeal was denied and the federal clock was ticking. Leonard Rojas therefore missed his statute of limitations deadline under the AEDPA, and was executed in 2002 without any habeas review of his conviction or sentence of death.48

We should not be under any misconceptions about the continuing need for habeas corpus. There continue to be many, many instances in which the state courts are unable or unwilling to fully safeguard federal constitutional guarantees.

The second point is about innocence. Some of the bill's proponents have argued that the "innocence" exceptions to these radical provisions will protect those truly "deserving" of federal review. Never in the history of the Great Writ – not through decades of the Rehnquist Court's pruning nor during passage of the AEDPA – has it been understood as a tool for the innocent. Habeas corpus has existed throughout our history as one means of protecting cherished American

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47 Tex. Defender Serv., "Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals" (2002), *available at* http://http://www.texasdefender.org//publications.htm

48 *Id.*

rights and values. Indeed, one of our core values is that we cannot determine who is guilty or deserving of punishment absent a fair proceeding in which everyone plays by the rules.

But the Members of the Subcommittee also should not be misled into believing that H.R. 3035's "exceptions" to Sections 2, 3, 4 and 9 will identify the innocent. In order to gain federal jurisdiction of a claim that would be barred under these provisions, a petitioner would have to show (1) that the facts underlying the claim "would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty," *and* (2) that the claim rests on a factual predicate that "could not have been previously discovered through the exercise of due diligence," *and* (under sections 2, 4 and 9) (3) that a denial of relief would be "contrary to, or would entail an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."[49]

This exception is effectively impossible to meet. For one thing, contrary to the bill's requirement, innocent prisoners often gain relief on a constitutional claim that did not depend on their lack of guilt. For example, the factual bases for Ernest Willis's claims were that the State of Texas had administered antipsychotic drugs to him without his consent, had withheld a psychologist's report stating that he did not meet the future dangerousness requirement for the death penalty. Neither of these would have led a fact finder to believe he was not guilty of the offense, but the District Attorney has since dismissed all charges against Mr. Willis, declared him to be actually innocent, and apologized to him and his family on behalf of the State of Texas.

Moreover, when state misconduct or incompetent counsel interferes with a prisoner's ability to litigate his claims, he will usually arrive in federal court either without sufficient evidence to meet the innocence standard, or with evidence that could have been or was discovered previously, but that defense counsel simply failed to investigate or use. Thus, John Tennison, who was freed after a federal judge granted relief, the State of California stipulated that he was factually innocent, and a California judge declared him to be officially factually innocent, could not have met the innocence exception upon arrival in federal court, because the state withheld the exculpatory evidence, including evidence about the real killer; that evidence was developed only after the federal court ordered discovery

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49 The exception for a new rule of constitutional law made retroactive to cases on collateral review would almost never apply, and could not apply under Sections 2, 4 or 9 in any event unless the claim also "would qualify for consideration" under the clear and convincing evidence of innocence standard.

in the case.[50] Nor does H.R. 3035 contemplate the provision of discovery or resources in federal court so that a previously unrepresented or continuously incarcerated prisoner could have the tools to demonstrate his innocence. Paradoxically, where a prisoner *already* developed the evidence of innocence in state court but it was ignored, it is doubtful that he could meet the bill's requirement that the facts not have been "previously undiscoverable." Thus Ricardo Aldape Guerra, who was convicted of shooting a police officer and sentenced to death in Texas, would likely have been denied relief *because* his lawyers exercised due diligence in state court in uncovering repeated examples of police and prosecutorial misconduct, including witness intimidation, the suppression of exculpatory evidence, and the intentional use of highly suggestive and misleading techniques to taint witness testimony, on the basis of which the habeas writ was granted, and without which the state conceded it had no case.[51] These are not the only problems with the "innocence" exceptions: among others, establishing innocence alone would not be enough, as the petitioner would then have to show that the denial of relief on his constitutional claim was itself "contrary to law" or "unreasonable," something many unjustly incarcerated prisoners have been unable to do since the AEDPA's enactment.

Thus, many people who we now know are innocent, or who may be innocent but have not yet had a fair and reliable trial, could not possibly meet the innocence exception simply *because* the state hid the evidence, their lawyers failed to investigate or present it, or their lawyers did investigate and present it but the

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50 *See Tennison v. Henry*, 2000 WL 1844301 (9th Cir. 2000); *Tennison v. Henry*, 203 F.R.D. 435 (N.D. Cal. 2001); *Tennison v. Henry*, 98-3842 (N.D. Cal. 8-26-2003), (Unpublished) Order Granting Amended Petition for Writ of Habeas Corpus and Denying Motion for Evidentiary Hearing as Moot; *Tennison v. City & County of San Francisco*, 226 F.R.D. 615 (N.D. Cal. 2005); *Tennison v. California Victim Compensation Board*, Case. No. __ (Superior Court of California in and for the County of San Francisco) (Petition for Statutorily Authorized Writ of Mandate to Review Decision of the California Victim Compensation and Government Claims Board, filed April 27, 2005); Seth Rosenfeld, *Witness: DA, cops coached me to lie; Sanders, partner accused in tainted murder testimony*, San Francisco Chronicle, June 19, 2003, at A1, *Conviction tossed in case tied to Sanders; Judge rules evidence wrongly withheld*, San Francisco Chronicle, Aug. 27, 2003, at A1; *D.A. vows to probe wrongful conviction; After 13 years in jail, S.F. man goes free without new trial*, San Francisco Chronicle, Aug. 30, 2003, at A1; *Hard sell for lost years; Second man freed in 1989 gang killing*, San Francisco Chronicle, Sept. 4, 2003, at A17; *Wrongly imprisoned man must prove case again for state to pay*, San Francisco Chronicle, Aug. 29, 2004, at B1; *2 men jailed 14 years fail to convince compensation panel*, San Francisco Chronicle, Dec. 18, 2004, at B3; Nina Martin, *Innocence Lost*, San Francisco Magazine, Nov. 2004.

51 *Guerra v. Collins*, 916 F. Supp. 620 (S.D. Tex. 1995), *aff'd, Guerra v. Johnson*, 90 F.3d 1075, 1080 (5th Cir. 1996).

state court ignored it or refused to admit it. There is no failsafe "innocence" exception to the removal of federal jurisdiction here.

Conclusion

I am hardly alone in urging this Subcommittee to reject this unwise and unnecessary legislation. Individuals and groups from across the political spectrum have loudly voiced their opposition to this unparalleled attack on the venerable writ of habeas corpus. Perhaps most notable among these is the resolution signed by 49 of the 50 state Chief Justices asking Congress not to pass this bill. If H.R. 3035 is not supported by those who would presumably benefit from its passage – the state courts – it should not be adopted here today.

Thank you.